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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 488

FRANK H. FRANTUM AND MINNIE ELEANOR FRANTUM, HIS WIFE,

Petitioners,

VS.

DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above entitled case on June 25th, 1957, which became final upon the issuance of its Mandate on July 25th, 1957.

Citation to Opinion Below

The majority and dissenting opinion in the Court of Appeals of Maryland has been printed on August 17, 1957, in the Atlantic Report, Second Series, Advance Sheets at page 408. The majority and dissenting opinions of the Court of Appeals appears in 133 A. 2d 408, and are also printed in an Appendix hereto.

Jurisdiction

Judgment of the Maryland Court of Appeals was entered on June 25th, 1957 (App. 9), and the Mandate thereon was issued on July 25th, 1957.

The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since Petitioners claim that they were denied due process of law under the Constitution of the United States.

Questions Presented

1. Whether a decree of a State court ascribing a particular religious faith to a child and denying a Petition for Adoption by a couple because their religious faith is different, constitutes a denial of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States, and whether a state Statute pursuant whereto the said Petition was denied is invalid as being repugnant to the provision of the 14th Amendment to the Constitution of the United States prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws?

2. Whether a decree of a State court denying a Petition for Adoption by a couple because of their age, constitutes a denial of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States?

3. Is such a decree and statute repugnant to the provisions of the 14th Amendment of the Constitution of the United States prohibiting a State from depriving any person of life, liberty, or property, without due process of law?

4. Is such a decree and statute repugnant to the provisions of the 14th Amendment of the Constitution of the

United States prohibiting a State from denying any person within its jurisdiction the equal protection of the laws?

5. Whether such a decree and statute are repugnant to the 1st Amendment of the Constitution of the United States, as made applicable to the States by the 14th Amendment of the Constitution of the United States, in that they constitute a law respecting an establishment of religion?

6. Is such a decree and statute repugnant to the 1st Amendment of the Constitution of the United States, as made applicable to the States by the 14th Amendment of the Constitution of the United States, in that they constitute a law prohibiting the free exercise of religion?

7. Whether the action of the highest court of a State in affirming the decree of a lower court on the basis of difference of religion and age of prospective adoptive parents and at the same time advising the Petitioners to re-file their petition to adopt the same child six (6) months from the date of the highest court's mandate, if the child has not been adopted by a younger couple, is a denial of "due process of law" and "equal protection of the laws" in the first instance?

Statutes and Constitutional Provisions Involved

The pertinent provisions of the Constitution of the United States and the Maryland statute are set forth herein (App. 17, 18).

Statement of the Facts

This case involves the denial of a Petition for Adoption filed by the Petitioners in the Circuit Court of Baltimore City, of an infant male child (Burton Stevens) who had been in their care as foster parents from a few weeks after his birth, until the Petition was filed on August 22, 1956.

The child was quite sickly and required considerable care and attention on the part of the Petitioners. The Circuit Court of Baltimore City ordered an investigation to be made by its Probation Department for Juvenile Causes (R. E. 22), which agency recommended the adoption; but, due to the fact that the Department of Public Welfare would not consent to the adoption, the matter was set for hearing before the Court. The Court dismissed the Petition on the grounds that the Petitioners were too old and that their religion was unlike that of the infant child whose natural mother professed to be Catholic. The Court of Appeals of Maryland, in a split decision, affirmed the Lower Court. However, they told the Petitioners to file another Petition within six (6) months from the date of their Mandate if the child had not been adopted by other parents in the meantime.

Reasons for Issuance of the Writ

The Petitioners submit that the judgment of the Court of Appeals of Maryland decided substantial questions regarding the Constitution of the United States in a manner not in accord with applicable decisions of this Honorable Court. They urge that the questions are of substantial and general importance, and that they have been decided erroneously by the Court below.

The case at bar presents the question of the constitutionality of a state statute prohibiting adoption across religious lines. Language similar to that contained in the Maryland statute has been considered by the highest courts of many states, but in all cases except two (Goldman v. Fogarty, 121 N. E. 2d 843; and, Matter of Santos, 278 App. Div. 373, 105 N. Y. S. 2d 716) the language was considered advisory or permissive only, the court in some cases expressing the opinion that if the language were to be given

mandatory effect there would be grave doubts as to its constitutionality. (State, ex rel Baker v. Bird, 253 Mo. 569, 162 S. W. 119; Describes v. Wilmer, 69 Ala. 25; Jones v. Bowman, 13 Wyo. 79, 77 Pac. 439.) There is no doubt that the language of the Maryland statute has been given mandatory effect. Miss Alice Sugars, Supervisor of the Adoption Division of the Department of Public Welfare, testified as follows (R. E. 16):

> "* * *. We do *never consider* a permanent plan on adoption placing a child in a home of not like religious faith. * * *"

Further, the Court of Appeals of Maryland upheld this practice by their affirmance of the ruling of the Circuit Court of Baltimore City.

Since Adoption in the State of Maryland is a matter of statute (App. 11) and the statute excludes three counties from its operation, your Petitioners contend that this is a violation of the 14th Amendment of the Constitution of the United States in that all people, including the Petitioners, should have the right to stand on an equal footing before the bar of justice in a Court of Law because the express purpose of the 14th Amendment is to prevent partiality and favoritism and to supply "equal protection of the laws".

> "The equal protection of Laws is a pledge of the protection of equal Laws."
>
> State of Missouri, ex rel Gaines v. Canada (1938), 59 S. Ct. 232, Certiorari granted, 59 S. Ct. 65, 305 U. S. 580;
>
> Skinner v. State of Oklahoma, ex rel Williams (1942), Certiorari granted, 62 S. Ct. 488, 315 U. S. 789;
>
> Chambers v. State of Florida, Certiorari granted (1940), 60 S. Ct. 127, 308 U. S. 541.

See dissenting opinion in the present case (App. 15):

> "* * *. The requirement in all of the Counties of the State except three that the adoption be by a person of the same religious belief as the minor or his parents 'whenever practicable', can hardly be deemed a strong State policy by reason of the exemption of those three counties. (The rule to be applied might be difficult to find if the adopting parents were outside of the three Counties and the natural parents were within, or vice versa.) In any event, the requirement is not absolute and it is doubtful whether constitutionally it could be made so."

The Court of Appeals of Maryland decided the Federal questions in a way not in accord with the applicable decisions of this Honorable Court when it affirmed the decision of the Circuit Court of Baltimore City which had determined that the faith of the child was Catholic because the child's mother professed to be of the Catholic faith.

It is the contention of the Petitioners that under the 1st Amendment of the Constitution of the United States, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *", as made applicable to the states under the 14th Amendment of the Constitution of the United States, the Maryland Court of Appeals had no competence to determine that the mother was a Catholic. See Kedroff v. St. Nicholas Cathedral, 344 U. S. 94; Watson v. Jones, 13 Wall. 679, People ex rel McCollum v. Board of Education, 333 U. S. 203. This is more strongly borne out in the case at Bar, since the facts prove that the mother's professed adherence to the Catholic faith was negated by her actions, e.g. giving birth to five children out of wedlock and not causing them to be baptized in accordance with the dictates of the Catholic Church.

The Petitioners further contend that a state statute which denies the benefit of the adoption procedure because of religious diversity between the prospective adoptive parents and the child is a denial of the equal protection of the laws since it effects discrimination without any reasonable relation to some purpose within the competency of the State. Pierce v. Society of Sisters, 268 U. S. 510; People ex rel. Everson v. Board of Education, 330 U. S. 1; Mo. ex rel Gaines v. Canada, 305 U. S. 337; Sipuel v. Okla., 332 U. S. 631; Sweatt v. Painter, 339 U. S. 629; Truax v. Corrigan, 257 U. S. 312; Cochran v. Kansas, 316 U. S. 255; Hirabayashi v. U. S., 320 U. S. 81.

It is further urged on behalf of the Petitioners that a state statute which interferes with the upbringing of a child in a religion other than that of its origin or of its mother's origin, is a law respecting an establishment of religion in that it constitutes a forbidden State aid to the Church, whose claim of sovereignty over the child is thus being granted legal sanction. Kedroff v. St. Nicholas Cathedral, supra; Burstyn, Inc. v. Wilson, 343 U. S. 495.

The Petitioners submit that the state statute involved in these proceedings amounts to a deprivation of liberty without due process of law both by and under the 14th Amendment to the Constitution of the United States and its application to the States of the 1st Amendment of the Constitution of the United States. Pierce v. Society of Sisters, supra; Meyer v. Nebraska, 262 U. S. 390; Cantwell v. Conn., 310 U. S. 296; U. S. v. Ballard, 322 U. S. 78; West Virginia State Board of Education v. Barnett, 319 U. S. 624.

It is submitted that an interpretation of a state statute denying the Petitioners the benefit of the adoption procedure by reason of their age, when such statute is silent as to a maximum age, is in violation of the 14th Amend-

ment of the Constitution of the United States in that it deprives them of "due process of law" and "equal protection of the laws".

The Petitioners further contend that the action of the Court of Appeals of Maryland in affirming the decree of the Circuit Court of Baltimore City on the basis of the difference of religion and age of the Petitioners, while at the same time advising the Petitioners to re-file their Petition for the adoption of the same child six (6) months from the date of the Mandate of the Court of Appeals if the child has not been adopted by a younger couple, is in violation of the 14th Amendment of the Constitution of the United States in that it deprives them of "due process of law" and their right to "equal protection of the laws". Certainly, the passage of time will not correct or in any way circumvent the two basic reasons for denying the Petitioners' right to adopt the child in question. It is urged that, if the Petitioners will be suitable adoptive parents for the child six months from the date of the Mandate, they *are suitable* adoptive parents for the child at the present time.

Conclusion

For the reasons above stated it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

In The Court of Appeals of Maryland

No. 205, October Term, 1956

Ex parte In the Matter of the Petition of Frank H. Frantum, et al., etc.

v.

Department of Public Welfare of Baltimore City

Brune, C. J., Collins, Henderson, Hammond, Prescott, JJ.

Opinion by Brune, C. J., Hammond, J. dissents.

Filed: June 25, 1957.

Majority Opinion of Court of Appeals of Maryland

This is an appeal from an order of the Circuit Court of Baltimore City dismissing the petition of the appellants, Frank H. Frantum and Minnie E. Frantum, his wife, which sought the adoption of an infant, white, male child, Burton Stevens ("Burton").

The child, the illegitimate son of Betty Ann Stevens, was born November 5, 1955. Prior to the birth of Burton his mother voluntarily applied to the Department of Public Welfare ("Welfare Department") for adoption service. Burton was adjudicated to be a dependent child and was committed to the Welfare Department on December 15, 1955. On December 31st he was placed in the home of the appellants for foster care. At the time of his placement

and for some time thereafter, Burton was physically in poor condition. He suffered a fracture of the left humerus at birth and was anemic. He also had other physical ills, including bad adenoids and respiratory infections. The appellants nursed him to health, and becoming very attached to him, they asked the Welfare Department for permission to adopt him. This request was refused by the Welfare Department, but the appellants nonetheless filed their petition in the Circuit Court of Baltimore City seeking to adopt him.

The trial court ordered its Probation Division to make an investigation and submit its recommendations as to whether or not to grant the petition for adoption. The Probation Division did so; it favored the adoption, but suggested a hearing in open court since the Welfare Department as legal guardian had refused to give its consent. The hearing was held and shortly thereafter the Chancellor signed an order dismissing the petition. The appeal is taken from this order.

The Chancellor in a "Memorandum of Court" set forth his findings which were the basis of denying the appellants' petition. He found that the arguments and testimony show that the appellants are "fine people, have a good home, and have done an excellent job in raising the child from a sickly child to good health. They are to be commended for that. There is no argument about their fitness as foster parents." He then stated the primary considerations that influenced his decision as follows; "I am influenced by the fact that his legal guardian (Welfare Department) refuses to consent * * *. Another persuasive element, and unfortunately for the Frantums, is the age of these foster parents. Mrs. Frantum will be forty-eight years of age in the next several months, and Mr. Frantum will be fifty-four years of age within the next several months. While at a good age as foster parents, unfortunately it is not an ideal age as adoptive parents for this infant. * * * When Mr. Frantum is sixty-four years of age and Mrs. Frantum is fifty-eight years of age, this child will be eleven years old. In his adolescence, this child may present problems with which

the Frantums at their age may not be able to cope. Younger prospective adopting parents present a better future for him." The Chancellor also stated, as a secondary issue in the case, the question of religious affiliation, saying: "The matter of religion has been brought into the case. A child should be placed, wherever possible, with people of the same religion. This child was born to a woman who professed to be a Catholic and requested that her child be raised a Catholic. The Frantums are of the Lutheran faith * * *. While I have given some consideration to this phase of the case, it was not the determining factor for my conclusion that this petition should be dismissed."

The law is firmly established in this State that in adoption cases such as the one before this Court the welfare and best interest of the child is the primary consideration. *Haney v. Knight*, 197 Md. 212, 218, 78 A. 2d 643, 646, and cases there cited; *Ex Parte Anderson*, 199 Md. 316, 322, 86 A. 2d 516.

Adoption in this State is wholly a matter of statute. *Spencer v. Franks*, 173 Md. 73, 195 A. 306; *Falck v. Chadwick*, 190 Md. 461, 59 A. 2d 187. Our adoption law fixes the minimum age for adoptive parents at twenty-one years, but it does not impose a maximum age limit. Code (1951) Article 16, Section 79. The general rule appears to be that under such statutes, advanced age alone will not amount to a disqualification. See 2 C. J. S., *Adoption of Children*, Section 8; *In Re Brown's Adoption*, (Fla.) 85 So. 2d 617. This also seems implicit in the opinion of this Court in *Ex Parte Anderson, supra*. It likewise appears from the opinion in that case that the age of the prospective adoptive parents is an important factor to be considered in determining what is for the good of the child. This is the view of the Department of Welfare of Baltimore City, as is shown by the testimony of workers in that Department given in this case. Similar views are expressed in the *Proceedings of the Maryland Adoption Conference* of April, 1956, which were published by the State Department of Public Welfare. In a discussion of the subject of "Early Placements", page 12 of the above proceedings, it is said:

"We need young couples for the young infant. The group agreed that flexibility about age was important but acknowledged that there was an age beyond which people should not take a tiny infant. It was agreed that most adoptive parents realize the validity of this. While a lot of people feel young at 40, they can foresee what it will be like to be dealing with an adolescent 15 years later. It was agreed that our age policies need careful interpretation to the community. If we are ready to explore the possibility with each applicant and keep in mind the principle of flexibility, it seems possible to handle the question of age with minimum damage to applicant."

In *Waller v. Ellis*, 169 Md. 15, 179 A. 289, the age of an uncle seeking to adopt a nine-year old, full orphan girl and (presumably) to take her away from the custody of her maternal grandfather, and the ages of the uncle's sister and of his feeble-minded brother who were the only other residents of the uncle's home, were among the reasons, though by no means the only reasons, for reversing a decree of adoption which the uncle had obtained. At the time of institution of the suit in 1931 the uncle was 58 years old, his sister was 60 and the feeble-minded brother was 61. The petitioning uncle was 62 when the case reached this Court.

In the *Anderson* case above cited, a physical ailment of the would-be adoptive mother apparently affected adversely her ability to care for the child. He had been over protected or "babied" to an extent which retarded his development. In the present case there is no such difficulty.

There is, however, the religious preference clause of Section 76. By that Section, "The General Assembly declares its conviction that the policies and procedures for adoption contained in this subtitle are socially necessary and desirable, having as their purpose the three-fold protection of (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by (an unfit) person * * *, and, (except in Allegany, Garrett and Washington Counties), wherever practicable, from adoption by

persons of a different religious belief than that of the minor or his parents, unless the natural parent or parents specifically indicate or consent to a difference choice; * * *". Though the religious preference clause does not impose an absolute requirement in those portions of the State not excepted from its operation, and though its force may be somewhat weakened by the very fact that three counties (for no stated reason) are excepted from its application, we think that it cannot be disregarded. The evidence shows that the mother of the child professed adherence to the Catholic faith and expressed the desire that the child be brought up in it. It further seems that it is practicable to place the child with younger adoptive parents who are members of the Roman Catholic Church.

We are of the opinion that the same rule should apply to appellate review of the decision of the Chancellor in an adoption case as in a custody case. Hence, where on appeal, the facts are undisputed and plain, this Court must exercise its best judgment in determining whether the conclusion reached by the Chancellor was the best one. See *Butler v. Perry*, 210 Md. 332, 123 A. 2d 453 (a custody case); *Burns v. Bines*, 189 Md. 157, 57 A. 2d 188 (also a custody case); *Ross v. Pick*, 199 Md. 341, 86 A. 2d 463 (decided as a custody case, assuming a decree of another state not to have resulted in a valid adoption); and *Walker v. Walker*, 209 Md. 428, 121 A. 2d 195 (custody in a divorce case).

Custody and adoption cases may present — and certainly the instant case does — serious problems and difficult decisions. The would-be adoptive parents here have nursed the child to health and have thereby (with an ironic result) brought him up to the Department of Welfare's standard for adoption. They have given him full love and affection and the Probation Department's report shows them to be fine people and recommends that they be allowed to adopt the child. The Department of Welfare, while asserting the religious preference provision of the law and while standing upon its foster home agreement with the Frantums, which purports to prevent their seeking to adopt

a child in their care without the consent of the Department, makes its main objection to the adoption on the ground of the age of the petitioners. That, of course, involves no reflection upon their fitness in other respects. (See the letter from the then Director of the Baltimore City Department of Welfare to Judge France quoted in the opinion in *Ex Parte Anderson, supra.)*

Looking ahead, as we feel bound to do, we believe that it is to the best interest of this child that he be brought up in the home of parents younger than the petitioners. We also think that the evidence fails to show that it is not practicable to comply with the religious preference clause either because of the absence of prospective adoptive parents of the same faith as the child's mother or because of the paramount best interests of the child. No question has been suggested in this case as to the validity of that clause, and somewhat similar clauses have been regarded as valid in other jurisdictions, though they have not always been found applicable. See, for example, *Gally, Petitioner*, 329 Mass. 143, 107 N. E. 2d 21, and an Annotation entitled "Adoption — Religion as factor" in 23 A. L. R. 2d at 701.

We find it unnecessary to pass upon the Department of Welfare's contention based upon the foster parents' agreement and express no opinion with regard thereto.

One cannot read even the printed record in this case without a feeling of sympathy for the foster parents who have done so much for this child through their love, their work and their care to bring him to health and happiness and who would like to adopt him as their own.

Primarily because of the inexorable fact of their age and its probable (though concededly not certain) effect ten or fifteen years hence, we feel impelled to conclude that an adoption by a younger couple would be better for the child, and to affirm the order appealed from. Our decision will, however, be without prejudice to the filing of a subsequent petition by the appellants if, despite the expectations of the Department, he is not actually adopted by a younger

couple within a reasonable time, which, would in the absence of unusual circumstances, we think be six months after the mandate of this Court is sent to the trial court.

DISSENTING OPINION

HAMMOND, J., dissenting:

Precedents and theories should never control the decision of a custody or adoption case since the answer to the question of what is for the best interests and welfare of the child necessarily depends on judgment applied to a set of facts and circumstances which, like the proverbial will, has no twin brother. In the present case, it seems to me that the Court has disregarded this salutary rule and has paid homage to homilies and made a fetish of formulas.

It is conceded that the would-be adopting parents are, in the words of the investigating probation officer, "good, stable, responsible persons", and in the words of the chancellor are "fine people" who "have a good home, and have done an excellent job in raising the child from a sickly child to good health". The probation department found that the boy had required a great deal more care and attention than is usually necessary for a normal child "and that he gives every indication of having received excellent care and much love from the petitioners." The probation department pointed out that the second floor apartment of the Petitioners' home is occupied by a daughter, Thelma Peters, and her husband and son, and said: "A very close relationship exists between the Petitioners and the Peters family, and the Peters are as devoted to the child sought in adoption as are the Petitioners." The financial position of the petitioners is sound. They have a substantial equity in their home, own their car outright, and the would-be father is not only employed at a good wage but receives, and will continue to receive, a substantial pension as a retired U. S. Marine.

It is obvious that the ages of a couple who wish to adopt a child are an important consideration. The authorities on

the subject themselves emphasize the need of flexibility. In the proceedings of the Maryland Adoption Conference, referred to in the opinion of the majority, it is said: "The group agreed that flexibility about age was important", and again said that "* * * age policies need careful interpretation to the community. If we * * * keep in mind the principle of flexibility, it seems possible to handle the question of age with minimum damage to applicant." In the present case, the probation department recommended that the petitioners be allowed to adopt the child even though their ages were such that normally this would not have been the case. The couple were regarded as young for their ages and as having a youthful outlook. They have been good for the child and the child apparently has been good for them. The Department of Welfare permitted them to have the child for a much longer period than is customary for foster parents, and, so, brought about almost inevitably the growth of a mutual love and affection between the child and the couple he regarded as his father and mother. Added to this was the increased love which they felt for the child because of having nursed him through a series of illnesses from a weak, sickly infant to a healthy, normal child. The prospective parents are sincerely afraid that the child will be seriously hurt if he is taken from them, and the probation department apparently shares that view. There is no reason to believe, apart from the uncertainties which attend human life generally and which would be substantially as great in the case of younger parents, that the petitioners will not be able adequately to care for the boy for the foreseeable future. In addition to this, the Peters family, who are young enough even by the ideal standards of the social workers of the Department of Welfare, are on hand and, in all probability, would take over if for any reason the petitioners became unable to continue to care for the boy. The child is in a happy, wholesome, loving home and to change that environment for theoretical reasons seems to me to be a completely unnecessary and unjustified experiment, which could very readily cause serious harm to the child.

It would be one thing if the petitioners were seeking to adopt a child that they had never had or cared for. Then the age question properly would be decisive. It is another thing when they have been permitted to care for the child over a long period and have demonstrated that they have both the inclination and the capacity to do so excellently. If there was ever a case where flexibility as to age should be applied, it is this case.

The question of religion would give me very little pause under the circumstances. The requirement in all of the Counties of the State except three that the adoption be by a person of the same religious belief as the minor or his parents "whenever practicable", can hardly be deemed a strong State policy by reason of the exemption of those three Counties. (The rule to be applied might be difficult to find if the adopting parents were outside of the three Counties and the natural parents were within, or vice versa). In any event, the requirement is not absolute and it is doubtful whether constitutionally it could be made so. Whether it is practicable, in any given case, to require that the adopting parents have the same religious faith as the parents of the child is a matter that must be measured, in the final analysis, by the best interests and welfare of the child. Here the boy was too young to have any religion of his own choice, and his mother seems not to have benefitted from hers or to have taken it too seriously since the child who is sought to be adopted was her fifth illegitimate child.

I would reverse the decree and permit the adoption.

STATUTES INVOLVED

Article 1, Amendments to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

Article XIV, Amendments to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 16, Annotated Code of Maryland, 1951 (as amended 1955):

"Section 76 — Legislative Policy. The General Assembly hereby declares its conviction that the policies and procedures for adoption contained in this subtitle are socially necessary and desirable, having as their purpose the threefold protection of (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by persons unfit to have such responsibility, and (except in Allegany, Garrett and Washington counties), whenever practicable, from adoption by persons of a different religious belief than that of the minor or his parents, unless the natural parent or parents specifically indicate or consent to a different choice; (2) the natural parents, from hurried and abrupt decisions to give up the child; and (3) the adopting parents, by providing them information about the child and his background, and protecting them from subsequent disturbance of their relationships with the child by natural parents."

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DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 488

FRANK H. FRANTUM AND MINNIE ELEANOR FRANTUM, HIS WIFE,

Petitioners,

VS.

DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals of Maryland appears in full on pages 9-17 of the Appendix to the Petition for Certiorari, and appears in 214 Md. 100, 133 A. 2d 408.

OBJECTIONS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO GRANT WRIT OF CERTIORARI

There is no question involving (1) a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, (2)

the repugnancy of a state statute to the said Fourteenth Amendment, or (3) the repugnancy of a state statute to the First Amendment of the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment to the Constitution, was ever presented to, or decided by, the Circuit Court No. 2 of Baltimore City, nor to the Court of Appeals of Maryland, in the pleadings, briefs, arguments to or opinions of those Courts. Stated more succinctly, the Petitioners did not even attempt to raise a federal question in either of the Lower Courts, nor did those Courts decide any such question.

It is well settled that the Supreme Court of the United States is without jurisdiction to review the judgment of a State Court by reason of a Federal question which was not raised below, or called to the attention of, or decided by the State Court.

Edelman v. California, 344 U.S. 357, 97 L. Ed. 387;
Dewey v. Des Moines, 173 U.S. 193, 197-198, 19 S. Ct. 379, 43 L. Ed. 665;
New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U.S. 646, 651, 45 S. Ct. 618, 69 L. Ed. 1135;
Whitney v. California, 274 U.S. 357, 362-363, 47 S. Ct. 641, 71 L. Ed. 1095;
New York ex rel. Cohn v. Groves, 300 U.S. 308, 5 S. Ct. 466, 81 L. Ed. 666;
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435, 60 S. Ct. 670, 84 L. Ed. 849;
CIO v. McAdary, 325 U.S. 472, 477, 65 S. Ct. 1395, 89 L. Ed. 1741, Wilson v. Cook, 327 U.S. 474, 483, 66 S. Ct. 633, 90 L. Ed. 793;
Earlier Cases collected in Annotations at 49 L. Ed. U.S. 413, 67 L. Ed. U.S. 556.

Not only is the record, including the Petitioners' Brief on Appeal to the Court of Appeals of Maryland, singularly

barren of any suggestion of the invalidity of the statute attempted to be drawn in question in the Petition for Writ of Certiorari herein, or of any suggestion of a denial of due process or equal protection of the laws, but both the majority and dissenting opinions expressly negate any such suggestion. The majority opinion states flatly that:

> "No question has been suggested in this case as to the validity of that clause, * * *" (App. 14).

The dissenting opinion, while questioning the constitutionality of an absolute rule as to religion, recognized that the Maryland Statute is certainly not absolute (App. 17).

The attention of this Honorable Court is directed to the fact that the Petitioners have not complied with Rule 23, 1. (f) of the Revised Rules of the Supreme Court of the United States in not having specified the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised.

It is therefore respectfully submitted that the Petitioners cannot invoke the jurisdiction of this Court under 28 U. S. C. Section 1257(3) not having shown that the validity of a state statute was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor having shown where any title, right, privilege or immunity was specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

QUESTIONS PRESENTED

The Respondent believes that the questions presented by the Petitioners are moot since the Court has no jurisdiction in this case. The Respondents further believe that even if this Court had such jurisdiction, the questions so

presented are unworthy of its consideration since they not only do not present any substantial Federal question, they include unwarranted conclusions of facts not appearing in the record.

The following questions are believed to present more clearly the issues which the Petitioners have attempted to raise:

1. Does a state statute violate the due process provisions of the Constitution of the United States by declaring that the legislative policy is to prevent (except in three counties), whenever practicable, the adoption of a child by persons of a different religious belief from that of a child or its natural parents?

2. Is such state statute a denial of the equal protection of the laws to petitioners for adoption who are of a religious belief different from that of the child?

3. Does such a statute constitute a law respecting the establishment of religion, or prohibit the free exercise of religion?

4. Does the dismissal of a petition for adoption of a baby on the ground of petitioners' relatively advanced age, constitute a denial of equal protection of the laws or of due process?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution and the Maryland Statute which the Petitioners deem to be pertinent are set forth in the Appendix to the Petition (App. 17, 18).

STATEMENT OF THE FACTS

The Statement of the Facts appearing in the Petition is substantially correct. The Respondent, however, refers this Court to the majority opinion in this case for a fuller and more accurate statement of the facts in this case (App. 9-11).

ARGUMENT

The statute in question certainly does not deprive the Petitioners of their lives, liberty or property without due process. Adoption was unknown at common law and was unknown at the time of the enactment of the 14th Amendment (The first Maryland adoption law was the Act of 1892, Chapter 244). The only "right" of the Petitioners is that granted by Maryland Statute to file a petition for and to be granted adoption upon a showing that the same was in accord with the best interest and welfare of the adoptive child. Obviously, this, in the opinion of the Lower Courts, they have not done. They have had their days in court and the judgment of properly constituted authorities denied the relief sought.

Due process can be involved only when there are existing rights to be defended. In the case of *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97, this Court stated that one aid to the decision of the question whether the denial of a certain right is a denial of due process is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. The crucial question is: Did those who then were formulating and insisting upon the rights of the people believe that the right was so fundamental that there could be no due process without it? (This passage quoted in *Slansky v. State*, 192 Md. 94, 63 A. 2d 599).

Due process of law is not violated if the Act operates without discrimination and in like manner against all persons of a class or because it is deemed in a particular case to work an inequitable result. *Poulas v. New Hampshire*, 345 U. S. 395, 75 S. Ct. 760, 97 L. Ed. 1105; *Owenby v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837; *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122.

The contention of the Petitioners that they have been denied equal protection of the law on religious grounds is not supported by the facts of this case. Certainly they are not singled out by the statute in question by reason of their particular color, creed, race, prior condition of servitude or location. Certainly the statute does not confer any additional right unto, nor does it discriminate against any particular creed, sect, belief or religious formula. Certainly the statute establishes no religion nor does it deny the Petitioners the right to practice their faith.

While it is true that some courts have indicated that such a statute might be invalid if mandatory, it is patent that the Statute in question is not mandatory and is only directory or advisory, and, in fact, merely declaratory of the case law on the subject.

Goldman, Petitioner, 331 Mass. 647 (1954);
Matter of Santos, 278 App. Div. 373;
State, ex rel Baker v. Bird, 253 Mo. 569, 162 S. W. 119;
Describes v. Wilmer, 69 Ala. 25;
Jones v. Bowman, 13 Wyo. 79, 77 Pac. 439.

64 Col. L. Review 356 indicates that "almost all" of the states have enacted similar legislation.

The manifest good sense and purpose of a rule favoring adoption of babies by young adoptive parents over old ones need not be argued for the purposes of this inquiry, and but small effort needs be expended to recognize the futility

of the argument that such a rule is in derogation of the "due process" and "equal protection" clauses. It might as well be argued that laws against sales of liquor to minors or rules prohibiting employment of persons over a certain age are likewise discriminatory.

As has been indicated, the only "right" which the Petitioners could possibly assert in this case is one which they have already exercised, to wit: the filing of their Petition. The Respondent refers this Court to page 29 of the Record Extract filed by the Petitioners and, an agreement there reproduced by which the Petitioners expressly waived even this illusory "right". The Court of Appeals of Maryland did not find it necessary to pass upon the validity of this agreement. It is certainly to be considered at this point in that the Constitutional privilege which they seek to assert has long since been expressly waived by them.

CONCLUSION

It is respectfully recommended that the Petition for Writ of Certiorari in this case be denied (1) because the Supreme Court of the United States has no jurisdiction in this case, and (2) that there is no substantial Federal question to be decided.

Respectfully submitted,

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